No. 89-1253

(2)

FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

ESTATE OF LOUIS YAEGER, DECEASED, BY JUDITH WINTERS, EXECUTOR, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the interest expenses incurred by decedent Louis Yaeger in purchasing securities on margin were subject to the limitations on the deductibility of "investment interest" imposed by Section 163(d) of the Internal Revenue Code.

2. Whether the notice of deficiency issued to the decedent's estate with respect to 1981, the taxable year in which he died, was invalid because the notice erroneously indicated that the taxable period involved was the entire calendar year 1981, rather than the period beginning January 1, 1981, and ending on May 11, 1981, the date of the decedent's death.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1233

ESTATE OF LOUIS YAEGER, DECEASED, BY JUDITH WINTERS, EXECUTOR, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 889 F.2d 29. The opinion of the Tax Court with respect to the interest question (Pet. App. 16a-31a) is unofficially reported at 55 T.C.M. (CCH) 1101. The order of the Tax Court with respect to the notice of deficiency question (Pet. App. 32a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1989. The petition for a writ of certiorari was filed on February 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. 1. Beginning in the mid-1920's, decedent Louis Yaeger began actively trading [1] stocks and bonds on the stock market on his own account, in addition to conducting an investment consulting business. In the 1940's, Yaeger gave up his investment consulting business because the management of his own account had grown so demanding. Thereafter, he devoted himself exclusively to trading on his own account, which was his sole occupation until the day he died. Yaeger maintained accounts with several brokerage firms in New York, including one where he maintained an office. He typically spent a full day at his office, researching investment opportunities and placing orders, and then read more financial reports at home. Pet. App. 3a.

Yaeger subscribed to a distinct investment strategy. He sought to buy the securities of companies that were extremely undervalued and to hold the securities until they reached a price that reflected the underlying value of the company. Thus, he rarely purchased "blue chip" stocks, and many of the stocks he held did not pay dividends. Yaeger engaged in thorough research to look for companies that were experiencing financial distress but whose underlying value was not recognized. Once Yaeger reached the conclusion that a company was experiencing temporary difficulties, he began to accumulate its stock. He would initially buy small quantities of stock to avoid attracting attention from other investors until

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[1] Like the courts below (see Pet. App. 18a n.6; *id.* at 2a n.3), we will use such words as "speculate," "trade," and "invest," for convenience in describing Yaeger's activities, without intending any inference as to the tax characterization or consequences of those activities.

he had accumulated a significant number of shares. Yaeger would try to retain his holdings until they had increased in price to a level that he believed reflected the company's true worth, when he could quickly sell a large block of shares. Pet. App. 4a, 23a.

Yaeger's investment strategy of acquiring stocks in numerous small units until he possessed a substantial block, which he then would hold until the price appreciated to the desired level, is illustrated by the pattern of his transactions in the years at issue. In 1979, he had 1,176 purchase transactions and only 86 sales transactions. In 1980, he had 1,088 purchase transactions and only 39 sales transactions. Pet. App. 3a. The transactions in these years also reflect that Yaeger's strategy was designed to produce profit from capital appreciation (as well as dividends and interest) rather than from short-term swings in the market; in 1979, he reported long-term capital gain of $13,839,658, dividends of $2,339,080, and interest of $57,958, but reported short-term capital gain of only $184,354.[2] For 1980, his long-term capital gain, dividends, and interest totaled $4,840,079, while his short-term capital gain was only $728,404. Pet. App. 5a.

Yaeger financed his purchases by borrowing to the maximum extent allowable under law and the custom of the brokerage houses, which was generally 50%. If the value of his stock rose, he would use that increased value as equity to support more debt. Dur-

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[2] During these years, gain from the sale of stock held for more than one year was defined as long-term capital gain, and gain from the sales of stock held for one year or less was defined as short-term capital gain. See 26 U.S.C. 1222(1) and (3) (1982).

ing the years 1979 and 1980, Yaeger's margin debt was 47% and 42%, respectively, of his portfolio value. Yaeger's total stock market related debt equaled $42,154,048 in 1979 and $54,968,371 in 1980. His interest expense with respect to this debt was $5,865,833 in 1979 and $7,995,010 in 1980. Pet. App. 4a-6a.

2. On his tax returns for 1979 and 1980, Yaeger deducted the full amount of the interest expenses he had incurred in those years. On audit, the Commissioner determined that Yaeger's interest expenses constituted "investment interest" within the meaning of Section 163(d) of the Internal Revenue Code,[3] and therefore that those expenses were deductible only to the extent of his "investment income." [4] Since that

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[3] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax years at issue (the Code or I.R.C.).

[4] Section 163(d) of the Code provided, in pertinent part, as follows:

> (1) In general
>
> In the case of a taxpayer other than a corporation, the amount of investment interest (as defined in paragraph (3)(D)) otherwise allowable as a deduction under this chapter shall be limited, in the following order, to—
>
> (A) $10,000 * * *, plus
>
> (B) the amount of the net investment income * * *,
>
> * * * * *
>
> (3) Definitions
>
> For purposes of this subsection—
>
> * * * * *
>
> (B) Investment income
>
> The term "investment income" means—
>
> (i) the gross income from interest, dividends, rents, and royalties,

latter term, as defined in Section 163(d)(3)(B) of the Code, encompassed only Yaeger's dividends, interest, and short-term capital gain, but not his long-term capital gain, the Commissioner disallowed in substantial part the interest deductions claimed by Yaeger.

Petitioners contested in the Tax Court the deficiencies in tax resulting from the disallowance of a large portion of the interest expense deductions. Petitioners maintained that Yaeger's extensive stock market activities constituted a trade or business, that the interest expenses in issue represented ordinary and necessary expenses of that trade or business, and that such business expenses could not be considered as "investment interest" under Section 163(d). The Tax Court rejected these contentions and sustained the deficiencies. Pet. App. 24a-31a.

The court explained that the decisional law long has drawn a distinction between "investors" and "traders," who seek to profit not from long-term capital appreciation in their investments, but rather from frequent trading to take advantage of short-term price swings in the market. These cases have

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(ii) the net short-term capital gain attributable to the disposition of property held for investment, and

(iii) any amount treated under sections 1245, 1250, and 1254 as ordinary income,

but only to the extent such income, gain, and amounts are not derived from the conduct of a trade or business.

* * * * *

(D) Investment Interest

The term "investment interest" means interest paid or accrued on indebtedness incurred or continued to purchase or carry property held for investment.

held that the activities of a trader can rise to the level of a trade or business, like those of a "dealer," but that those of an investor do not. Pet. App. 25a-27a. And the court further noted that "[t]he question of when the trading activity of a taxpayer passes over the line between investment activity and trade or business activity" is one that turns on the "facts and circumstances" (*id.* at 29a; see also *id.* at 26a) of each case. On these facts, the Tax Court concluded that Yaeger was an investor, not a person engaged in the trade or business of trading securities. Pointing to the undisputed evidence establishing that Yaeger's consistent practice was to purchase securities he considered to be greatly undervalued and to hold such securities for long-term appreciation, the court determined that Yaeger's stock market activities, although regular and extensive, were those of an investor. *Id.* at 29a-30a.[5]

3. The court of appeals affirmed on this issue (Pet. App. 7a-9a). Like the Tax Court, the court of appeals stated that the case law has long drawn a distinction between investors, who "are 'primarily in-

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[5] The court elaborated on this conclusion as follows (Pet. App. 30a):

> Yaeger's stock market activities were fundamentally the same as the activity of other investors. He targeted a stock which was, for some reason, selling at a price below what it was worth. He bought the stock at this low price and waited for the fortunes of the company to improve, finally selling the stock for a profit. This activity is defined as investment. The distinguishing characteristic with respect to Yaeger's activity is that he took unusually risky positions, based on his extensive research, and that he produced some startling successes. This, however, only makes him a very good investor, rather than a trader.

terested in the long-term growth potential of their stocks' " and who are not engaged in a trade or business, and traders, who trade securities "with reasonable frequency in an endeavor to catch the swings in the daily market movements and profit thereby on a short term basis" and may be engaged in a trade or business. *Id.* at 7a-8a. Noting that most of Yaeger's profits came from long-term appreciation, interest, and dividends, the court of appeals stated that "[t]his emphasis on capital growth and profit from resale indicates an investment motivated activity" (*id.* at 9a). The court further concluded that the resulting disallowance of Yaeger's interest expenses in the instant case, to the extent those expenses exceeded his investment income, was fully in accord with the congressional purpose underlying the limitations embodied in Section 163(d) (Pet. App. 8a-9a).

B. 1. Yaeger died on May 11, 1981. Pursuant to Section 443(a) of the Code, his taxable year 1981 automatically terminated on the date of his death. His estate filed a federal income tax return (Form 1040) on his behalf for the short period January 1, 1981, through May 11, 1981.[6] After conducting examinations of Yaeger's returns for 1979, 1980, and 1981, the Commissioner issued two notices of deficiency concerning those years. One notice of deficiency determined deficiencies for the taxable years ending December 31, 1979, and December 31, 1980. The second notice of deficiency was issued for the taxable year 1981. The latter notice incorrectly indicated that the taxable period involved was the calen-

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[6] Yaeger's estate elected a fiscal year ending April 30 and later filed a fiduciary income tax return (Form 1041) covering the income tax owed by the estate for the period May 11, 1981, through April 30, 1982. Pet. App. 10a.

dar year ending December 31, 1981, rather than the short taxable period occasioned by Yaeger's death, which ran from January 1, 1981, through May 11, 1981. Petitioners filed a single petition in the Tax Court for redetermination of the deficiencies set forth in the two notices of deficiency. More than two years later, when the case was called for trial, petitioners moved to dismiss for lack of jurisdiction the portion of the petition relating to the taxable year 1981, claiming that the deficiency notice for that year was a nullity because of the error in describing the taxable period involved. Pet. App. 10a, 32a.[7]

2. The Tax Court granted the estate's motion to dismiss the petition with respect to the 1981 taxable year for lack of jurisdiction (Pet. App. 32a-34a). Noting that its jurisdiction is dependent upon the issuance of a valid notice of deficiency, the Tax Court ruled that it had no jurisdiction to consider an asserted deficiency for any year not set forth in the notice. Because the notice of deficiency issued by the Commissioner for Yaeger's taxable year 1981 indicated that it covered a period that included both the correct 1981 taxable year plus a portion of the next taxable period, the court held that the notice was invalid.

3. The court of appeals reversed on this issue (Pet. App. 10a-15a). The court held that mistakes in the contents of a notice of deficiency do not render the notice invalid where the mistakes do not frustrate the basic purpose of the notice, *viz.*, to inform the taxpayer that a deficiency in a specified amount has been determined in his tax for a particular pe-

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[7] At the time this motion was filed, the expiration of the statute of limitations precluded the Commissioner from issuing a new notice of deficiency that would correct the error in describing the taxable period.

riod (*id.* at 11a-12a). Here, the court concluded, the deficiency notice was sufficient to advise petitioners that the deficiency determined by the Commissioner related to the Form 1040 filed by petitioners on behalf of Yaeger for the taxable period beginning January 1, 1981, and ending on the date of his death, May 11, 1981. The court of appeals explained that both the deficiency notice and its attachments indicated that the deficiency related to the individual income tax Form 1040 filed on behalf of Yaeger personally, not to the fiduciary income tax Form 1041 filed by the estate for the period May 11, 1981, to April 30, 1982, which covered the estate's tax liability. *Id.* at 13a. It further noted that every adjustment in the attachments to the notice of deficiency related to items reported on Yaeger's Form 1040 for the period ending May 11, 1981 (*id.* at 13a-14a). In these circumstances, the court concluded, "[t]he notice of deficiency and its attachments clearly and fairly advised the estate that the commissioner intended to assess it for the short period reported in Yaeger's 1981 return" (*id.* at 14a).

ARGUMENT

The court of appeals correctly held that the interest expenses incurred by Yaeger in purchasing stocks and bonds for long-term capital appreciation constituted "investment interest" within the meaning of Section 163(d) of the Code and, therefore, were deductible only to the extent of his "investment income." The court also correctly rejected petitioners' contention that the notice of deficiency was invalid because it referred to the calendar year 1981, instead of the short taxable year caused by Yaeger's death. The court's decision is not in conflict with any decision of

this Court or of another court of appeals, and it presents no legal issue of broad importance that would warrant this Court's attention. Accordingly, there is no reason for further review.

1. Section 163(a) of the Code generally provides for the deduction of interest incurred on indebtedness. In the case of noncorporate taxpayers, however, Section 163(d) limits the deductibility of "investment interest" to the amount of the taxpayer's "investment income," plus $10,000—although disallowed amounts can be carried forward and deducted in future years (subject to the same limitation). The term "investment interest" is specifically defined by the statute as "interest paid or accrued on indebtedness incurred or continued to purchase or carry property held for investment" (§ 163(d)(3)(D)).

Section 163(d), which originated in the Tax Reform Act of 1969, Pub. L. No. 91-172, § 221, 83 Stat. 487, was enacted to address the prevalent practice of borrowing money to purchase investment assets. Believing that allowing a current deduction for interest expenses designed to produce long-term investment gain produced a distortion of income, Congress acted to limit such interest deductions. The House Report noted that "[w]here the interest expense exceeds the taxpayer's investment income, it, in effect, is used to insulate other income from taxation," and that, even where "the receipt of the income from the investment may be postponed (and may be capital gains), the taxpayer will receive a current deduction for the interest expense even though it is substantially in excess of the income from the investment." H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1, at 72 (1969). Thus, Section 163(d) was designed to restrict the favorable tax consequences previously available to an individual who incurs interest ex-

penses in order to make long-term investments. See generally *Miller* v. *Commissioner*, 70 T.C. 448, 453-455 (1978).[8]

This case falls squarely within both the language and the purpose underlying Section 163(d). Since "investment interest" is specifically defined in the Code as interest on indebtedness incurred "to purchase or carry property held for investment" (§ 163 (d)(3)(D)), the court of appeals was clearly correct in holding that interest expenses incurred by an individual in purchasing stocks or bonds to earn money from long-term capital appreciation or dividends or interest—*i.e.*, for investment—constitute "investment interest" subject to the limitations on deductibility of Section 163(d), regardless of the amount of time that the individual devotes to his investment activities or whether he derives his livelihood exclusively from the earnings from his investments. Because it is undisputed that Yaeger's investment strategy was to purchase securities for the purpose of

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[8] As originally enacted in 1969, the term "investment income" included both long-term capital gain and short-term capital gain, as well as dividends and interest. In 1976, however, Congress eliminated long-term capital gain as an item of investment income against which investment interest could be offset, and it is this version of the statute that is applicable to the tax years at issue here, 1979 and 1980. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 209, 90 Stat. 1542; I.R.C. § 163(d)(3)(B). Section 163(d) was revised substantially by Section 511 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2244, effective for taxable years beginning after December 31, 1986. Under the 1986 Act, investment interest is deductible to the extent of net "investment income," which is now defined as the sum of (1) gross income from property held for investment and (2) any net gain attributable to the disposition of property held for investment. See 26 U.S.C. 163(d)(1) and (4)(B).

holding them for long-term capital appreciation, *i.e.*, for investment, the interest expenses that he incurred in financing these investments are subject to the limitations of Section 163(d). A contrary result would contravene not only the plain import of the statutory text, but also the congressional purpose of preventing a "mismatching of the investment income and related expenses of earning that income" (H.R. Rep. No. 413, *supra*, Pt. 1, at 72) by allowing Yaeger a current deduction for interest expenses incurred for the purpose of producing income in future years.

Petitioners argue (Pet. 11-18) that the interest expenses incurred by Yaeger in buying securities on margin are not "investment interest" within the meaning of Section 163(d), even though they were incurred to purchase assets for the purpose of holding them for long-term capital appreciation. Relying on a statement in H.R. Rep. No. 413, *supra*, Pt. 1, at 73 (see Pet. 16), petitioners maintain that any interest incurred in a trade or business is excluded from the reach of Section 163(d), and they further contend that Yaeger's stock market activities were so regular, continuous, and extensive that they qualified as the carrying on of a trade or business. This argument is without merit.

First, while the legislative history of Section 163(d) indicates that Congress anticipated that interest expenses incurred in carrying on a trade or business would be unaffected by that provision, it is clear from both the statute and the legislative history that Congress intended for investment interest to be governed by the statutory limitations. The statement relied upon by petitioners merely contrasts the type of interest not intended to be covered by the statute with interest "incurred * * * to purchase or carry

property held for investment" (H.R. Rep. No. 413, *supra*, Pt. 1, at 73); thus, there is no basis for suggesting that Congress intended to exclude interest incurred for the purpose of investing in the stock market from the reach of Section 163(d), even if the investment activity is so regular and extensive as to constitute the taxpayer's sole source of livelihood. Indeed, the distinction that petitioners seek to draw between smaller, part-time investors and larger, full-time investors is diametrically opposed to the thrust of Section 163(d). The concern that led to the enactment of Section 163(d) was that large investors were gaining an unwarranted tax advantage from the deduction of investment interest (see H.R. Rep. No. 413, *supra*, Pt. 1, at 72); in fact, the statute mitigates the effect on small investors by allowing the deduction of up to $10,000 in investment interest in excess of investment income. The exception for full-time investors that petitioners seek to create is at odds with both the plain language of Section 163(d) and its basic purpose.[9]

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[9] Petitioners complain (Pet. 16) that the decision below unfairly precludes Yaeger from offsetting the interest expenses he incurred in purchasing securities on margin against the long-term capital gain he realized on the sale of those securities. This objection, however, has nothing to do with the issue in this case—*viz.*, whether Yaeger's interest expenses are excepted from the general rules governing investment interest because of the intensity of his investment activity; rather, it is a broad objection to the fairness of those general rules. Petitioners are complaining that Congress should not have excluded long-term capital gains from the definition of "investment income," which constitutes the limitation on the deductibility of investment interest. As we have noted (note 8, *supra*), prior to 1976 investment interest was deductible against long-term capital gain, as well as against short-term capital gain and dividends and interest, and there-

Moreover, the courts below correctly held that Yaeger's activity in investing in the stock market for his own account did not qualify as a "trade or business." This Court long ago established in *Higgins* v. *Commissioner*, 312 U.S. 212 (1941), that a taxpayer who merely manages his investments is not carrying on a trade or business, regardless of the extent or continuity of the transactions or the work required in managing the portfolio. See also *Moller* v. *United States*, 721 F.2d 810, 813-814 (Fed. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); *Purvis* v. *Commissioner*, 530 F.2d 1332, 1334 (9th Cir. 1976). The courts have drawn a distinction between "investors" who purchase securities for long-term capital appreciation and income, and "traders" who buy and sell securities frequently in an attempt to profit from short-term price swings in the market. While the activities of "traders" have been recognized as a trade or business, the activities of investors, whether or not pursued on a full-time basis, have not been so regarded, in accordance with this Court's decision in *Higgins*. See, *e.g.*, *Moller* v. *United States*, *supra*; *Purvis* v. *Commissioner*, *supra*; *Liang* v. *Commissioner*, 23 T.C. 1040, 1043 (1955).

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fore the situation of which petitioners complain did not exist prior to 1976. Congress then amended the statute, however, to eliminate long-term capital gain as an item of investment income against which investment interest could be deducted, creating *for all taxpayers* the alleged unfairness identified by petitioners. Thus, Congress specifically determined in 1976 that an individual should not be permitted to offset his investment interest against his long-term capital gain, and petitioners give no reason why it is particularly unfair to apply this determination to Yaeger's situation.

Applying this distinction to the situation of a particular taxpayer involves a factbound inquiry. Both courts below concluded here that Yaeger's activities were those of an investor, not a trader. He borrowed substantial sums to purchase securities for long-term capital appreciation, and his investment strategy was not designed to profit from short-swing changes in the market. The conclusion that this activity was that of an "investor" that does not rise to the level of a trade or business is fully consistent with the other cases that have applied this distinction.[10] Moreover, Yaeger's extensive borrowing for the purpose of financing long-term investments falls within the

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[10] There is clearly no merit to petitioners' contention (Pet. 11) that the decision below conflicts with the Fourth Circuit's decisions in *Commissioner* v. *Nubar*, 185 F.2d 584 (1950), cert. denied, 341 U.S. 925 (1951), and *Adda* v. *Commissioner*, 171 F.2d 457 (1948), cert. denied, 336 U.S. 952 (1949). Those cases did not involve the limitations on interest expense deductions contained in Section 163(d); rather, the question presented was whether a nonresident alien who engaged in frequent trades on United States commodities and stock markets was subject to United States taxation on his profits on the ground that he was engaged in a "trade or business" in the United States. The court of appeals did not address the general distinction between investors and traders and did not examine the market activity of the aliens in terms of whether the activity was primarily directed at short-term swings in the market or long-term appreciation. What the court of appeals did examine was the purpose of the statute involved there, concluding that Congress clearly intended that the type of activity involved in those cases would be subject to United States taxation. See *Commissioner* v. *Nubar*, 185 F.2d at 586. By contrast, petitioners' suggestion (Pet. 15) that an "investor" should be defined as one who intends to earn only "passive income from interest and dividends" is contrary to the existing case law. See, *e.g.*, *Moller* v. *Commissioner*, *supra*; *Purvis* v. *Commissioner*, *supra*.

situation that Congress was intending to address in enacting the limitations on deducting investment interest (see pages 10-11, *supra*), thus, there is no merit to petitioners' suggestion (Pet. 16-18) that the established "investor"/"trader" distinction applied by the courts below is at odds with the purpose of Section 163(d).

Petitioners are also mistaken in contending (Pet. 11-14) that the decision below conflicts with this Court's decision in *Commissioner* v. *Groetzinger*, 480 U.S. 23 (1987). The Court there held that a full-time gambler was engaged in a trade or business within the meaning of Section 162, notwithstanding that he made wagers solely for his own account and hence did not hold himself out to others as engaged in the selling of goods or services. Although the Court analogized the situation there to that of an active trader on the stock exchange (see 480 U.S. at 33-34), the Court did not reject the distinction drawn in lower court cases between investors and traders. Indeed, the Court noted that its decisions supported a distinction between traders and investors (*id.* at 31), and it cited without disapproval the cases on which the court below most heavily relied (*id.* at 34 n.13; see Pet. App. 7a-8a). In any event, the Court in *Groetzinger* plainly had no occasion to pass on the specific question presented here—whether interest expenses incurred by a full-time investor who purchases securities for long-term appreciation constitute "investment interest" subject to the limits on deductibility imposed by Section 163(d); thus, the disallowance of Yaeger's claimed interest deductions is fully consistent with this Court's decision.[11]

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[11] Even if petitioners were correct that *Groetzinger* should be viewed as casting doubt upon the line of cases denying

2. There is no merit to petitioners' contention that the notice of deficiency was invalid because it misstated the ending date of the taxable year. Yaeger reported his taxes on a calendar year basis, but because he died in the middle of 1981, his taxable year 1981 automatically ended on the date of his death (see I.R.C. § 443(a)). In the deficiency notice issued for 1981, however, the Commissioner erroneously identified the taxable period involved as the calendar year ending December 31, 1981, rather than the short period beginning January 1, 1981, and ending May 11, 1981, the date of Yaeger's death. The court of appeals correctly held that this technical error did not invalidate the notice of deficiency (Pet. App. 11a-14a).

The courts have long recognized that the purpose of a deficiency notice is to advise the taxpayer that the Commissioner has determined a deficiency in his tax for a particular tax period and that technical errors that do not thwart that basic purpose do not

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"trade or business" status to a full-time investor in the stock market who seeks to profit from long-term appreciation, the result in this case would be unaffected. Section 163(d) expressly imposes limitations on the deductibility of "investment interest," and that term is not defined in terms of "trade or business" activity. As we have noted, the remark in the legislative history suggesting that the statute does not cover interest expenses incurred in a trade or business was made to contrast such expenses with investment interest expenses; it plainly was premised on the existing understanding that an investor was not engaged in a trade or business. If, in the wake of *Groetzinger*, it can now be argued that an individual like Yaeger is engaged in the "trade or business" of investing, that might have ramifications under other provisions of the Code (see Pet. 18-19), but it would not permit such an individual to escape the limitations imposed by Section 163(d) on the deductibility of "investment interest."

invalidate the notice. See, *e.g.*, *Barnes* v. *Commissioner*, 408 F.2d 65, 68 (7th Cir.), cert. denied, 396 U.S. 836 (1969); *Commissioner* v. *Stewart*, 186 F.2d 239 (6th Cir. 1951); *Olsen* v. *Helvering*, 88 F.2d 650 (2d Cir. 1937). Moreover, the courts have specifically rejected petitioners' argument here that an incorrect reference to the taxable period involved necessarily invalidates a notice of deficiency. It is only where the taxpayer establishes that he was misled to his detriment by the error in the deficiency notice regarding the taxable year involved that the notice becomes invalid. See *Sanderling, Inc.* v. *Commissioner*, 571 F.2d 174 (3d Cir. 1978); *Estate of Scofield* v. *Commissioner*, 266 F.2d 154, 167 (6th Cir. 1959); *Commissioner* v. *Forest Glen Creamery Co.*, 98 F.2d 968, 971 (7th Cir. 1938), cert. denied, 306 U.S. 639 (1939); *Burford* v. *Commissioner*, 76 T.C. 96 (1981), aff'd, 786 F.2d 1151 (4th Cir. 1986).

Here, as the court of appeals explained (Pet. App. 13a-14a), the information provided to the estate in the deficiency notice itself and the attachments thereto clearly informed the estate that the notice pertained to the Form 1040 that the estate filed on Yaeger's behalf with respect to the taxable period ending May 11, 1981. Indeed, in moving in the Tax Court to have the deficiency notice declared invalid, petitioners never contended that they were misled or prejudiced by the error in that notice. Petitioners are attempting to seize upon a technical, harmless error in the deficiency notice to obtain a windfall at the expense of the public fisc. This error, however, did not invalidate the notice any more than would a typographical error in the taxpayer's name that did not cause any confusion. The court of appeals correctly rejected petitioners' claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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